

**CASE SUSTAINED**  
**NO RECOMMENDATION MADE BUT SERIOUS VIEWS EXPRESSED**

**CS/496**

**COMPLAINT AGAINST THE GIBRALTAR HEALTH AUTHORITY OVER THEIR REFUSAL TO ALLOW THE COMPLAINANT TO REVIEW HER MEDICAL RECORDS**

1. The Complainant felt aggrieved with the Gibraltar Health Authority (the 'GHA') because they would not give her access to her medical records. The Complainant had been suffering from a condition known as vertigo-basilar syndrome, which affected her state of mind. After five years the Complainant started receiving effective treatment for her condition, and wanted to review what had happened to her during this time.

2. Once her recovery was initiated, the Complainant realised that there were huge gaps in her memory. She could not remember the events of the preceding five years so she asked the GHA to give her access to her medical records in order to 'catch up' on the last few years of her life, but they refused. The Complainant was unsure if she had a valid complaint so she approached the Office of the Ombudsman for advice.

3. By way of assistance, the Ombudsman wrote to the GHA on 1<sup>st</sup> July 2003, asking them to provide the Complainant with reasons for their refusal to disclose her medical records. The GHA replied to the Ombudsman's letter on 15<sup>th</sup> September 2003, explaining the following,

*"The law in Gibraltar regarding access to medical records is that individuals do not have the right of access to their medical records...It is therefore illegal for officers of the Authority to disclose medical records except in two circumstances: (1) when disclosure is by or at the request of a clinician acting in the course of his professional duties, or (2) when ordered to do so by a court of law."*

4. The Ombudsman was not satisfied with this reply, so he wrote to the GHA on 29<sup>th</sup> September 2003 asking them to direct him to the relevant legislation, citing the appropriate sections. The GHA was only able to provide the Ombudsman with guidelines produced by the then Minister for Health during May 1997.

5. The Ombudsman received the above-mentioned guidelines on 7<sup>th</sup> October 2003 and, for the sake of clarity, the pertinent points are reproduced below,

*4.1 Patients have no common law right to access their own medical records.*

However, the guidelines further explain at paragraph 4.3 that, notwithstanding the general rule stated in paragraph 4.1, there are certain exceptional situations where patients may acquire entitlement to access records, the GHA guidelines give examples:

- (a) *disclosure under statute*
- (b) *disclosure by virtue of Court Order*
- (c) *voluntary disclosure where legal action is pending or contemplated*
- (d) *voluntary disclosure where none of the above circumstances apply (subject to discretion of doctors to agree)*

6. The Ombudsman drew attention to the fact that in their original letter, the GHA had omitted to inform the Ombudsman about paragraph 4.3(d), and instead stated as follows:

*“Since the vast majority of requests fall into these two categories, i.e. either from patients or relatives in the course of their care (when the clinician directly deals with it) or from lawyers intending to proceed with legal actions (when the court orders release), there has been little need in the past to provide procedures or laws for any other circumstances.”*

7. The Ombudsman also felt it pertinent to reproduce paragraph 5, which deals with the exceptions to the rule, which had also been omitted from the GHA’s original reply letter to the Ombudsman.

## 5.2 **The relevance of the Patients Consent**

5.2.1 *On many occasions staff members are confronted with the situation that a patient either writes in directly or through lawyers saying that they wish to have sight of their case notes or records (as opposed to a medical report for which different rules may apply).*

5.2.2 *In those circumstances as outlined in paragraph 4.1 the patient has no general right to access such notes.*

5.2.3 *However the fact that consent to such disclosure is being given in writing by the patient is a factor in deciding whether the GHA will voluntarily make such disclosure.*

5.2.4 *In deciding this issue three fundamental questions should be asked:*

- (1) Is the patient contemplating legal action (against GHA or another party)?*
- (2) If the answer is no, will disclosure detrimentally affect the patient?*
- (3) If the answer is yes, are the records privileged from disclosure?*

### No Legal Action

5.25 *If legal action is not contemplated the rule in paragraph 4 applies (subject to the practitioner feeling that the access is warranted. This last question should be decided by the practitioner determining whether voluntary disclosure is in the patient's interests having balanced all relevant factors at the time).*

8. In his letter of 17<sup>th</sup> October to the GHA, the Ombudsman highlighted the above points and added,

*"I believe that it is amply clear that the guidelines, contrary to your assertion, do provide for records to be released to patients 'subject to the practitioner feeling that access is warranted'. Further, the practitioner is required by the guidelines to determine whether voluntary disclosure by the GHA is in the patient's interest. It would appear that it is the practitioner and not the administration who decides whether records should be released or not. In doing so, the practitioner has to determine whether releasing the records would be detrimental to the patient; if the determination is that the requested release would not be detrimental then, I humbly submit, the records would have to be released. Therefore, before deciding whether to release records to a patient, the GHA has a duty, in pursuance of its own guidelines, to determine the matters contained therein".*

9. Subsequently, the Complainant was invited by the GHA to go over her medical notes with one of the Doctors involved in her case on 13<sup>th</sup> February 2004. The Complainant managed to get the information she had requested, and was better placed to understand what had happened to her during the five years prior to her recovery.

10. The Ombudsman once again felt disheartened with the GHA because it had failed to provide a proper and efficient service to a member of the public. The Complainant, the Ombudsman pointed out, had experienced a terribly disturbing and confusing five years. She had requested the possibility of going over her medical notes, but this had been blankly refused by the GHA for no good reason.

11. The Ombudsman had written to the GHA seeking an explanation. The reply which he received was incorrect and misleading. Nevertheless, after close scrutiny of the above-mentioned guidelines, the Ombudsman was able to ascertain that the GHA had chosen two paragraphs as their *pièce de résistance*, yet they had chosen to ignore the rest of the guidelines.

12. The Ombudsman reminded the GHA that providing members of the public with incorrect, incomplete or even misleading information amounted to maladministration. The Ombudsman expressed the view that the GHA should advise members of the public more accurately and 'customer care' should be attributed with greater importance. Additionally, the Ombudsman pointed out that the GHA should familiarize itself with its own guidelines, as otherwise it would be incapable of following or explaining their

policies to members of the general public. The Ombudsman sustained the complaint, and hoped the GHA would now provide correct information to members of the public legitimately seeking access to their medical records.